BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BARBARA COOK-SHELTON Claimant VS. **HONEYWELL INTERNATIONAL** Respondent AND **INDEMNITY INS. CO. OF NORTH AMERICA** Insurance Carrier	)	Docket No. 1,036,101

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the November 29, 2007, oral preliminary order and the December 4, 2007, Preliminary Decision entered by Administrative Law Judge Robert H. Foerschler. Michael W. Downing, of Kansas City, Missouri, appeared for claimant. Clifford K. Stubbs, of Roeland Park, Kansas, appeared for respondent.

On November 29, 2007, the Administrative Law Judge (ALJ) found:

> [A]s far as I'm concerned I think she fell at work, it's a compensable accident. Not because her foot caught on something or she fell or was carrying something or what it was, you know, people are going to fall down. I don't think the compensability of this thing is a big problem.[1]

In his December 4, 2007, Preliminary Decision, the ALJ found that he considered this a compensable accident for preliminary purposes. He further found that the surgery requested by claimant would be authorized only if it is recommended by Dr. Greg Van Den Berghe.

---

[1] P.H. Trans. (Nov. 29, 2007) at 28.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 29, 2007, Preliminary Hearing and the exhibit and the transcript of the October 18, 2007, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent contends claimant gave several different versions of how she came to fall and that her contention that respondent's floor was tacky or rippled is not credible. Respondent argues that claimant's injury occurred from a personal risk while she was performing a normal activity of day-to-day living, *i.e.*, walking, and did not arise out of and in the course of her employment.

Claimant argues she tripped over a ripple in the flooring in respondent's facility and, therefore, the ALJ's Preliminary Decision should be affirmed.

The issue for the Board's review is: Did claimant's accident arise out of and in the course of her employment with respondent?

FINDINGS OF FACT

Claimant is a 26-year employee of respondent and worked as a material handler. Her job consists of moving product from shelves to the line, and she spends a lot of her day walking. On June 5, 2007, at 6:15 a.m., she was walking down a hallway carrying papers from the photocopier when she fell. Claimant testified that she hit a patch on the floor and her foot stuck. She moved her other foot forward and became stuck again, and then she fell down on her left side, injuring her left shoulder, left ankle, ribs, left kidney, and left breast. No one witnessed her fall.

A preliminary hearing was held in this matter on October 18, 2007. At that time, claimant testified she had tripped over a ripple in respondent's floor. She stated that respondent's floor is coated so that electricity will not travel through the floor. She described the floor as "tacky" or the opposite of slippery and said that a person's feet cannot slide on it. The dirtier the floor is, the more a person could stick to it. She also stated that over the course of the years, pieces of the floor have chipped out and the floor has been re-covered, making it uneven and rippled with high and low spots. She testified that on the day she fell, the floor was dirty. She indicated that she was wearing athletic shoes when she tripped over the rippled floor and fell.

After claimant fell, a coworker called security, and a security guard helped her up off the floor. The security guard filled out a report that indicated claimant was "walking

down the hall and tripped on a ripple on the floor."[2] The report was dated June 7, 2007, two days after the accident, but claimant indicated she gave the security guard that information at the time of the accident.

Robin Thompson is the occupational health nurse at respondent. She spoke with claimant the morning of the accident while she was on her way to work. She had received a telephone call from Edmond Light, II, respondent's manager of health, safety and environment, advising her that claimant had fallen. Mr. Light put claimant on the telephone, and Ms. Thompson asked her what had happened. Ms. Thompson said that claimant's exact words were, "I tripped over my own feet."[3] Ms. Thompson visited with claimant later and filled out a report. At that time, claimant told her that she had tripped on a ripple on the floor, and this is what Ms. Thompson put in her report. Ms. Thompson is not familiar with the material that is put on the floors or how it was applied but said the floor has a smooth surface. She also stated that she had not noticed that the floor was "tacky."

After claimant's fall, she was sent to OHS Comp Care, where she was seen by Dr. William Tiemann. Claimant reported to Dr. Tiemann that she was "walking briskly across the floor at work and there were ripples in the floor [surface] and she caught her shoe on one of the ripples and tripped and fell forward."[4] After being seen by Dr. Tiemann, she returned to work, where she was seen by respondent's plant physician, Dr. Ramon Nichols. Dr. Nichols' report indicated that claimant was "walking to a copying machine when she stubbed her left foot twice."[5] Claimant testified that she did not stub her toe and that she was walking away from the copy machine, not walking to the copy machine.

At the October 18, 2007, hearing, claimant looked at pictures respondent had taken of the hallway where she had fallen. She indicated she could see the ripples on the floor in the pictures. The pictures show the floor has a sheen, but claimant indicates that on the day she fell the floor was dirty from people's shoes and the bad weather. Claimant thinks the floor has been cleaned and buffed since the date of the accident.

Claimant was eventually found to have a full thickness retracted rotator cuff tear of her left upper extremity. She was seen by Dr. Greg Van Den Berghe, who discussed with her options for treatment. His report stated: "Risks, benefits, alternatives, potential

---

[2] P.H. Trans., (Oct. 18, 2007), Cl. Ex. 2.

[3] *Id.* at 34.

[4] *Id.*, Cl. Ex. 4 at 1.

[5] *Id.*, Resp. Ex. B.

complications of treatment were discussed in detail. The patient and her husband wish to proceed with operative intervention."[6]

After the October 18, 2007, hearing, the ALJ issued an order stating:

> [T]he injury itself is considered compensable for now. But the doctor accessed does not seem to have the same expectations that she and her husband display.
>
> . . . So it is determined that the surgery requested is deferred until a full hearing on the evidence is heard and determined.[7]

This Preliminary Decision was not appealed, but claimant requested another preliminary hearing to clarify the ALJ's order. A second preliminary hearing was held on November 29, 2007. At that time, respondent again disputed the compensability of this claim. The only testimony taken at the second preliminary hearing was from respondent's witnesses, Ms. Thompson and Mr. Light.

Ms. Thompson's running notes concerning this incident were entered as an exhibit. Those notes indicated that claimant stated she "must have tripped over my own feet."[8] That entry was made at 8:00 a.m., as soon as Ms. Thompson got into the office on June 5, 2007.

Mr. Light testified that respondent's facility has an electrostatic dissipated floor designed to drain away static electricity. The floor surface has a two-part epoxy applied over a concrete floor. The material is mixed according to manufacturer's directions and poured, and then a trowel is used to smooth the floor out. Because of the way the epoxy is manufactured, it will settle down to a smooth surface. The floor surface is typical of other surfaces in terms of hardness and coefficient of friction. He testified that OSHA has established that a 0.5 or above static coefficient of friction is considered a safe walking surface, while the Americans with Disabilities Act has specified a 0.6 static coefficient of friction. Respondent has taken measurements and found the static coefficient of friction on its floors is about 0.78, which is within the OSHA range for a safe floor.

Mr. Light had not tested the floor to measure its smoothness but testified that the floor was not rippled, had no bumps, and was not uneven. He testified the floors are cleaned nightly.

---

[6] *Id.*, Cl. Ex. 3.

[7] ALJ Preliminary Decision (Nov. 2, 2007) at 1-2.

[8] *Supra* note 1, Resp. Ex. A at 1.

The ALJ continued to find the claim compensable after the November 29, 2007, hearing. His Preliminary Decision further stated that "immediate surgery will be authorized only if Dr. Van Den Berghe, himself, recommends it now."

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[9] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[10]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[11]

K.S.A. 2006 Supp. 44-508(d) states in part:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

---

[9] K.S.A. 2006 Supp. 44-501(a).

[10] *Kindel v. Ferco Rental, Inc*., 258 Kan. 272, 899 P.2d 1058 (1995).

[11] *Id.* at 278.

K.S.A. 2006 Supp. 44-508(e) states:

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

In *Hensley*[12], the Kansas Supreme Court adopted a risk analysis. It categorized risks into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) neutral risks which have no particular employment or personal character.

In *Anderson*,[13] the Kansas Court of Appeals stated:

> Personal risks include those associated either with natural aging or normal day-to-day activity. Where an employment injury is clearly attributable to a personal condition of an employee, and no other factors intervene or operate to cause or contribute to the injury, no award is granted. But where an injury results from the concurrence of some preexisting personal condition and some hazard of employment, compensation is generally allowed.
>
> An injury arises out of employment if the injury is fairly traceable to the employment and comes from a hazard the worker would not have been equally exposed to apart from the employment.
>
> A manifestation of force is not necessary for an incident to be deemed an "accident" under K.S.A. 44-508(d).

The Kansas Court of Appeals, in *Johnson*[14], held:

> In an appeal from the final order of the Workers Compensation Board awarding compensation for an injury suffered by an employee at the workplace, under the facts of this case substantial evidence did not support the board's finding that the employee's act of standing up from a chair to reach for something was not a normal activity of day-to-day living.

---

[12] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 258, 597 P.2d 641 (1979).

[13] *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, Syl. ¶¶ 5, 6, 8, 61 P.3d 81 (2002).

[14] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, Syl. ¶ 3,147 P.3d 1091, *rev. denied* 281 Kan. __ (2006).

The court found it significant that "Johnson had a history of three or four [prior] incidents of left knee pain. Her treating physician, Dr. Jennifer Finley, testified that '[i]t looks like she had had years of degeneration and had some previous problems, and it was just a matter of time.'"[15]

In *Martin*,[16] the Kansas Court of Appeals held:

> Workers compensation should be reserved for persons who are injured on the job due to hazards specifically associated with that particular work, not for persons who come to an employer with a preexisting disease and suffer the inevitable consequences of that disease while they happen to be at work.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[17] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[18]

ANALYSIS

Claimant has alleged that she suffered a specific traumatic injury on June 5, 2007, while walking on an uneven or tacky surface. Respondent does not dispute that claimant fell and was injured at work, but only disputes the reason for claimant's fall. Respondent argues claimant's injuries resulted merely from walking, and walking is an activity of day to day living. Claimant's fall while walking at work would be compensable if it resulted from either a tacky or uneven floor, which would be a hazard of her employment, or because of a neutral risk due to her tripping for some unexplained reason or over her own feet. Her accident and resulting injury would not be compensable, however, if it resulted solely from a personal risk, such as a preexisting physical abnormality or condition. Likewise, disabilities that result from activities of day to day living are not compensable because they result from a personal risk.

The statutory definition of "injury" excludes disabilities that are shown to be the result of the natural aging process or the "normal activities of day-to-day living." The

---

[15] *Id.* at 788. See also *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

[16] *Martin v. CNH America LLC*, No. 97,707, unpublished Court of Appeals opinion filed Nov. 16, 2007, slip. op. at 10, 2007 WL 4105361 (Kan. App.)

[17] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[18] K.S.A. 2006 Supp. 44-555c(k).

burden to show a disability is the result of the natural aging process or the normal activities of day-to-day living is upon the respondent.

Although walking can be described as a normal activity of day-to-day living, K.S.A. 44-2006 Supp. 508(e) does not exclude "accidents" that are the result of such activity, but rather excludes injuries where the "disability" is a result of the natural aging process or the normal activities of day-to-day living. In this sense, it is another way of excluding personal risks from coverage under the Workers Compensation Act.

The Board has long concluded that the exclusion of disabilities resulting from the normal activities of day-to-day living from the definition of injury was an intent by the Legislature to codify and strengthen the holding in *Boeckmann.*

Claimant's job requires a significant amount of standing and walking on hard surfaces. The court in *Boeckmann* distinguished from its holding those cases where "the injury was shown to be sufficiently related to a particular strain or episode of physical exertion" to support a finding of compensability.[19] Similarly, the court in *Johnson* distinguished its holding from cases where the injury is "fairly traceable to the employment."[20] The Board concludes that the Legislature did not intend for the "normal activities of day-to-day living" to be so broadly defined as to exclude disabilities caused or aggravated by the strain or physical exertion of work. Claimant's accident resulted either from a hazard of her employment or from a neutral risk. In either case, her injury is compensable.

CONCLUSION

Claimant's accident arose out of and in the course of her employment with respondent. Her accident and resulting injury are directly attributable to her work. Claimant was not injured because of a personal risk and is not disabled due to a personal condition as in *Boeckmann* or *Johnson*. Accordingly, her disability did not result from the normal activities of day-to-day living.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Robert H. Foerschler dated December 4, 2007, is affirmed.

---

[19] *Boeckmann*, 210 Kan. at 737.

[20] *Johnson*, 36 Kan. App. 2d at 789.

IT IS SO ORDERED.

Dated this _____ day of February, 2008.

_____
HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Michael W. Downing, Attorney for Claimant
Clifford K. Stubbs, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge